SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-445

GENERAL ELECTRIC CREDIT CORPORATION,
Petitioner,

vs.

T. R. GRUBBS, D/B/A T. R. GRUBBS TIRE & APPLIANCE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW T. R. GRUBBS, Respondent, and makes this his answer and response to the Petition for Writ of Certiorari heretofore filed by Petitioner General Electric Credit Corporation, and for such respectfully shows:

The decision of the Trial Court and the Court of Appeals in the case at bar were entirely correct and this Honorable Court should deny the Petition for Certiorari.

QUESTIONS FOR REVIEW

With reference to the Questions for Review suggested by GECC in its petition for certiorari, Respondent Grubbs respectfully submits:

Question No. 1 is misleading and gives an inaccurate impression of what transpired. The true facts are that GECC appealed Grubbs' original damage award and succeeded in reversing it. The Court of Appeals remanded the case for a new determination of Grubbs' damages on remand. The damages were determined after a full evidentiary hearing on damages. GECC, not being satisfied with the results of that new trial, now attempts to revert to the original $20,000.00 damage award *which it appealed and got reversed.*

Question No. 2. There was no deprivation of due process on the new trial determination of damages because all parties had full notice and participated fully in the new trial.

INCORRECT STATEMENTS

There are two statements in the Petition for Certiorari which are incorrect and which Respondent Grubbs deems necessary to correct:

With reference to line 6 on page 7 of the Petition: The Court of Appeals did not remand Grubbs' original damage recovery because it "could not determine which dollar damages it was affirming and which dollar damages it was reversing". It reversed the entire damage award and remanded the case for a precise determination of Grubbs' damages *for the specific torts mentioned in the remand.* The Court of Appeals affirmance of the last trial shows that Petitioner's assertion is not correct.

With reference to line 14 on page 7: The Trial Court did not "enlarge" Grubbs' recovery. It was a *new recovery,* based on the law of the case, after a remand and a new trial on damages.

PETITIONER'S ASSERTED REASONS FOR GRANTING THE WRIT

In answer to GECC's asserted reasons for granting the Writ, Grubbs submits:

Question I

A.1. The Trial Court's judgment here was the precise action which it was required to take in following the Court of Appeals mandate on remand.

2. The judgments of the Trial Court and the Court of Appeals are not in conflict with any decision, but are fully consistent with the law.

B. GECC is arguing here that when a plaintiff or claimant recovers an award and seeks to sustain that award against attack on appeal, only to have it reversed and remanded for a new trial, he can never recover *in a new trial* more than the amount of the *reversed award.* That is plainly erroneous. It is only when the award is *affirmed* that the claimant, on remand for ancillary matters, is held to his original award. See *Turner* v. *Kirkwood,* 62 F 2d 256 and cases there cited.

Contrary to GECC's assertions, we did not complain of the original damage award and seek to "enlarge" it on remand; it was reversed and remanded for a new trial on damages, at the instance of GECC. There was no "enlargement"; it was *a new trial* on damages.

The cases cited by GECC on this argument do not support its position. For example, the case of *Lettsome* v. *U. S.,* 434 F 2d 907 which GECC says is "on all fours" with this case, was a case where the original damage award was *affirmed,* not reversed as ours was. The remand there was

not on damages, but was only to determine if Lettsome was contributorily negligent. Since Lettsome's damage award was affirmed on the first appeal, of course he could not re-open it on the remand. The same is true with the other cases GECC cites. For example, in *Canter* v. *American & Ocean Insurance Co.*, 7 L. Ed. 688 (1928) the award of the trial court was affirmed. There was no award which was reversed as we had. Likewise, in *U. S.* v. *Blackfeather*, 155 U. S. 218 (1894) the original trial court decree was *affirmed*. This Court correctly held that the appellee could not then secure a modification of it. Again, in *U. S.* v. *American Railway Express Co.*, 265 U. S. 425 (1924), neither party appealed from the trial court's judgment which they subsequently sought to re-open. The matter at issue there had not been reversed. GECC cites *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185 (1937), but that case is entirely consistent with our position and is against GECC's contention. There the plaintiff sought relief in the trial court on two grounds. In the trial court *he recovered on one* of the grounds and *lost on the other*. The defendant appealed and the plaintiff did not cross appeal from the trial court's ruling *which went against him*. This Court held that in the appeal, the appellee could not attack the adverse ruling in the trial court that no one appealed. That situation is not at all like ours, where our award was reversed and remanded on appeal, at the behest of GECC. We did not attack our award on appeal or in the trial court. GECC attacked it and secured a reversal and a remand for a new trial.

Neither is *Mutual Life Ins. Co.* v. *Hill*, 193 U. S. 551 (1904) supportive of GECC's position. It supports our position, as is so clearly indicated by its own language:

> "While undoubtedly an *affirmance* of a judgment is to be considered an adjudication by the appellate court

> that none of the claims of error are well founded . . . yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided . . . All questions which appear upon the record and have not yet been decided are open for consideration."

We have already distinguished *Lettsome* v. *U. S.*, supra. Likewise, *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484 (1954) is not in point. It was an appeal to the Supreme Court from a Court of Appeals judgment. *Neither party appealed* from the adverse ruling it received in the Court of Appeals judgment. Therefore, that judgment could not be examined *in the Supreme Court*. *LeTulle* v. *Scofield*, 208 U. S. 415 (1940) does not support GECC's contention to all. It involved a complaint that a Court of Appeals had reversed a case *upon a ground not assigned or argued on the appeal*, but that is not the situation here. The Court of Appeals here did not reverse our damage award in the first trial *sua sponte*. GECC directly attacked it on appeal and succeeded in getting it reversed and remanded.

This case is controlled by the principles applied in *Turner* v. *Kirkwood*, 62 F 2d 256. That case emphasizes the difference between the kind of cases cited by GECC and the kind of case we have here, which is one where an appellee, although not completely satisfied with his recovery, attempts to sustain it against attack on appeal, only to have it reversed. In such a case it would be a gross perversion of justice to say that because of the reversal the appellee may not enjoy the benefits of his

recovery but he is nevertheless bound by the disadvantages attached to it.

There is an additional and very important reason why GECC's position is not tenable in the case at bar. When Grubbs recovered the $20,000.00 damage award in the first trial in the Trial Court, that award did not include his losses on a substantial portion of the assets, called the "94 accounts", because since the Trial Court had cancelled his note to GECC which was given in payment of those accounts, Grubbs did not own those accounts and did not have the right under that holding to collect them. But when the Circuit Court on the appeal ruled that GECC was entitled to collect the note, the 94 accounts then belonged to Grubbs, and he had the sole right to collect them. He had paid for the accounts, and they were his to collect; therefore, his losses on those accounts had never been adjudicated and had to be adjudicated in the new trial on remand.

Question II

In response to GECC's asserted reasons for granting a writ under this portion of its petition, Grubbs respectfully submits:

1. There was no denial of due process in the new trial. GECC appealed from the first damage award, asking for a reversal. It got a reversal and a new trial, which was conducted after notice with full participation by GECC, and with a full presentation of evidence.

2. The action of the Trial Court on remand was exactly what was ordered by the Court of Appeals on the first appeal, and was entirely correct.

3. The evidence on the new trial compelled the decision. GECC does not even claim here that the evidence was insufficient.

It is difficult for us to see how GECC can claim it "had no notice . . . or opportunity to present its defenses." The remand was ordered on April 13, 1973. The new trial was held on April 2, 1974. GECC was there and participated fully in all phases of the new trial. All parties knew it was a new trial on damages. *In fact, long before the new trial, GECC requested the Trial Court to limit damages to the amount of the original judgment, and the Trial Court denied such request* on February 26, 1974, *more than a month before the trial began.*

GECC says it had no opportunity to contest damages in excess of $20,000.00 *in the first appeal.* There was no need for it to do so, because its own appeal resulted in a reversal of that award in its entirety. But GECC has *now also appealed from the new award* entered in the new trial, and has had a full hearing and determination in the Circuit Court.

Grubbs' "second bite" as GECC calls it, came only because GECC secured a reversal of our "first bite", and compelled a re-trial. One who seeks and secures a reversal of a damage award necessarily takes the risk that the damages proved at the new trial may exceed those proved at the first trial.

The Circuit Court in the first appeal did not remand the damage award for the Trial Court to "allocate" it, it remanded it for a new trial to "precisely determine" Grubbs' damages for torts it found GECC had committed, but for which proper damages had not been awarded. That this was the Court of Appeals intention is amply illustrated by its opinion in this appeal.

At line 15 of page 19, GECC says that the Trial Court proceeded "without a mandate from the Court of Appeals informing all parties of the need for a new trial." Nothing

could be farther from the truth. The mandate was clear. There was no "re-opening" and no "reversal by the Trial Court". Rather, there was a new trial on damages, based upon a full presentation of evidence after full notice to and participation by all parties.

GECC attempts to make much of the relative contentions of the parties in the first appeal. In doing so, it only further illustrates the fallacy of the position it takes now. For example, see GECC's brief in the first appeal, where it "Prays that the judgment of the trial court . . . awarding Grubbs a judgment of $20,000.00 against it be reversed . . . and that Grubbs take nothing against GECC . . ." The appeals court did just that when it said "We reverse the judgment below" (page 1 opinion) and again when it said (page 11 opinion) ". . . We reverse the award of $20,000.00 in damages . . . and remand for a precise determination of damages on his counterclaim." The Court had previously stated (page 11 opinion) that those damages were to be (1) credit for trust receipt financing; (2) losses on accounts which Grubbs had the sole right to collect; and (3) credit for merchandise wrongfully repossessed. That is precisely what the Trial Court did at the re-trial. His decision could have been nothing else in view of the evidence presented.

CONCLUSION AND PRAYER

This case has been in the courts for 10 years. It has been through 2 trials in the District Court, 3 appeals to the Court of Appeals, and 1 appeal to the Supreme Court. There should be an end to litigation sometime. GECC has certainly had more than its day in Court. It is time that the matter be ended and Grubbs has his rightful recovery. Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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By: /s/ J. R. CORNELIUS, SR.